



**Motor Trade Association  
of South Australia**

# **Australian Competition Law Review 2016**

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## Table of Contents

Executive Summary.....	3
Background .....	6
ACL Structure .....	7
Objectives.....	7
Legal Framework .....	8
Proposed ACL Reforms .....	9
Clarity and Definition of Terms.....	9
'Lemon Laws' .....	9
Product Safety Standards .....	12
Balance in ACL Decisions.....	14
New Businesses Models and ACL.....	15
Access to Purchasing and Consumption Data.....	18

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## Executive Summary

The Motor Trade Association of South Australia (MTA) welcomes the Commonwealth's review of Australian Consumer Law (ACL). This submission makes a number of observations on the operation of ACL as well as recommendations for reform.

The MTA acknowledges the important role and diligent work of the Australian Competition and Consumer Commission and its South Australian counterpart Consumer and Business Services, with whom the MTA enjoys a strong and productive relationship.

ACL is predicated on *improving consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly.*<sup>1</sup>

This establishes three goals for ACL: consumer protection, effective competition and fair trading, without determining precedence for these goals. As a consequence, they must have equal standing before the law.

It also establishes that consumers are participants in markets and an equal party in any transactions that occur in that market.

These are crucial foundational principles under ACL that the MTA contends are not being observed correctly by regulatory bodies.

The MTA surveyed its 1,100 members to test attitudes towards ACL and preferences for the direction of reform.

Broadly, the survey found the following views were held by the majority of respondents to the MTA's survey:

- 'Lemon' laws are not required as there are already sufficient protections under ACL;
- A lack of understanding of the definitions, thresholds and obligations incumbent on businesses when considering major faults, minor faults, and reasonable time by businesses;
- A commensurate lack of confidence from business that regulators, consumers or courts of arbitration had sufficient of these terms or were applying that understanding consistently;
- A plurality of respondents had been subjected to an ACL claim and when they were it was usually settled before determination;
- A strong view that interpretation of ACL is tilted too far in favour of consumers and larger businesses such as insurers at the expense of fair trading and effective competition;
- Views were largely, but not universally, in favour of ensuring that Australian Standards were reflected in international standards, rather than creating Australian Standards that were out of step with our major trading partners.

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<sup>1</sup> COAG, *Intergovernmental Agreement for the Australian Consumer Law*, October 2009.

- There was strong agreement that there should be strengthened protections for businesses against faulty and substandard supplied parts, and that manufacturers do not provide sufficient support to retailers and wholesalers when they are subject to ACL claims.
- Most agreed that government auction houses should be subject to the same ACL obligations as licensed vehicle dealers, with the costs being absorbed by sellers or the auction house.
- There was universal agreement that online reviewers and consumers should be subject to the same ACL obligations as businesses where they post misleading reviews that damage a business or provide the basis for coercive bargaining.
- Online review platforms should disclose any commercial agreements, relationships and methodologies used to determine their review rankings or commentary.

In addition to the comments contained throughout this submission, the MTA makes the following recommendations:

1. The objectives and structure of ACL are adequate and do not require amendment at this time;
2. The Consumer Guarantee Threshold, currently set at \$40,000 in 1986, should be indexed to 2016 prices and updated annually thereafter;
3. Definitions and thresholds for major and minor faults and reasonable time need to be clarified in the Act to provide certainty and reduce the risk of litigation;
4. Lemon Laws should not be introduced as ACL already provides consumer protections for these types of faults, and it is administratively prohibitive to implement. This policy proposal, as well as any enforcement proceedings are particularly compromised by the proposed allowance of personal imports;
5. Claims under ACL should not be *res ipsa loquitur* evidence that a fault exists and that the retailer or wholesaler is at fault. Businesses should also be protected as consumers where they are purchasing from third parties in order to supply to the public and where they are unable to reasonably determine whether a fault exists at the time of purchase. Further protections for businesses should be implemented in terms of supply of second hand parts and from faulty and substandard component supply. ACL should consider providing protection to third party installers through a manufacturer's warranty for parts;
6. Online reviewers, including consumers, are equal parties to a transaction under ACL and should be subject to equal obligations for unconscionable conduct and misleading, deceptive and malicious conduct. Simply holding an 'genuine opinion' should not constitute a defence from these actions nor from defamation;
7. Intellectual property developed from data collected by businesses should not be made available in order to satisfy an academic argument about consumer empowerment, as it would risk providing Australia's competitive advantage to overseas competitors and contradicts the Commonwealth Cyber and Data Security Strategy.

Bizarrely, the ACCC and various competition reviews have adopted inconsistent views on how to best protect consumer interests. Initial retail price is not the only determinant of consumer protection. Physical safety is at least as important to consumer protection as pricing

considerations. The full cost of providing, maintaining and servicing a product, and access to remedies under ACL, all add to the lifetime cost of a product. These facts need to be considered when determining how best to deliver consumer protection.

In this context, the MTA restates its total opposition to changes to the Motor Vehicle Act 1959 to allow for personal imports of new and nearly new cars and motorcycles, which seek to weaken physical safety considerations as well as increase the financial risks for consumer.

Personal imports will have a severe impact on the ability of Australian car and motorcycle dealerships to compete, given that overseas sellers will not have to provide the same high level of after sales support, warranty obligations nor safety guarantees that Australian dealerships do.

These facts have already been acknowledged by the Federal Government's decision to reject the Harper Review's recommendation, supported by the ACCC, to allow for the personal importation of second hand vehicles.

The MTA agrees that consumers and businesses should enjoy adequate protections under ACL in order to achieve the goals articulated in the Intergovernmental Agreement of 2009.

This is best achieved by providing for a balance between the three central goals of ACL that promote consumer protection, encourage effective competition and enable fair trading.

## Background

The following comments are provided on behalf of Motor Trade Association of South Australia (the MTA), an employer organisation representing the interests of 1,100 members and approximately 15,000 employees in the retail automotive sales, repair and service sector.

Eighty per cent of these businesses employ less than 20 employees in South Australia and ninety three per cent nationally. The automotive retail sector adds more than \$2.85 billion to the State economy annually and employs more than 26,000 people in South Australia – more than the ten largest South Australian companies combined.

The MTA GTS is a Registered Training Organisation and Group Training Scheme which delivers post trade and apprentice training to mechanics including diesel training to both the industry and also places some 500 apprentices in over 200 host businesses.

As a representative state body, the MTA has 13 sections representing the full range of businesses within the motor industry, excepting mass vehicle manufacturing. These sections represent businesses in the following sectors:

- Towing
- Vehicle Repair
- Motorcycle
- Bus and Coach
- New Car Dealerships
- Used Car Dealerships
- Farm Machinery
- Retail Tyre
- Service Station
- Auto Recyclers
- Heavy Vehicle
- Vehicle Servicing
- Vehicle Rental

## ACL Structure

### Objectives

The Intergovernmental Agreement for the Australian Consumer Law 2009 is the foundation upon which the ACL's policy framework is based. It states that the overarching objective is:

*To improve consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly.*

To achieve this objective, the Intergovernmental Agreement identified six operational objectives, including:

- to ensure that consumers are sufficiently well informed to benefit from, and stimulate effective competition;
- to ensure that goods and services are safe and fit for the purposes for which they were sold;
- to prevent practices that are unfair;
- to meet the needs of those consumers who are most vulnerable, or at greatest disadvantage;
- to provide accessible and timely redress where consumer detriment has occurred; and
- to promote proportionate, risk based enforcement.

The MTA considers that the overarching objective and the six operational objectives of ACL essentially support the policy objective of providing for consumer protection, effective competition and fair trading.

The MTA wishes to state at the outset that it has the highest regard for both the ACCC and CBS, enjoying a strong and collaborative relationship with both.

The issue is the emphasis that regulators place on each of these goals and principles. There is widespread agreement amongst MTA members the Australian Competition and Consumer Commission (ACCC) and State based agencies such as Consumer and Business Services (CBS) in South Australia are predisposed to the concerns of consumers at the expense of businesses.

There are two principle concerns that are raised by MTA members. Firstly, that there is an imbalance between the rights of consumers and the rights of businesses.

Secondly, businesses at, or near, the end of a supply chain do not receive adequate protection, as they are also consumers and have equal rights under ACL in their own right to fair trading and effective competition protection.

The objectives of ACL do not assign specific weighting to which elements are more important than any other. Consumer protection, effective competition and fair trading are equally important as an objective of ACL.

There is a strong perception that regulatory agencies prioritise the rights of consumers, who may make vexatious claims, at the expense of businesses, ie effective competition and fair trading.

Small and medium sized enterprises have limited resources to defend themselves against multiple frivolous claims. They are likely to exhaust the cash reserves of a business during litigation, in a process that is perceived to be biased anyway. It is easier and cheaper to allow a claim to be settled regardless of its merits. This is an unbalanced effect of current ACL interpretation

In the context of the ACL's objectives, any additional regulation, including the creation of new agencies or authorities, should seek the impartial arbitration of claims. They should not be tasked with driving a policy agenda predicated primarily on producing the lowest immediate cost to consumers, which is often a false economy.

The MTA considers that ensuring consumers are not unduly disadvantaged through dishonest conduct is an important economic standard that helps drive confidence in the Australian economy.

Equally, it is important that it is recognised that effective competition and fair trading are two way streets. Businesses exist to provide goods and services to consumers and do so in a way that is a positive transaction for both parties. They do not exist to fleece their customer base or to deliberately provide inadequate goods or services.

Therefore businesses should not be considered as having a starting position of doing so.

## Legal Framework

The MTA considers the legal structure of ACL is adequate.

The Consumer Guarantee Threshold is currently set at \$40,000. This figure was determined in 1986 and has not changed in the subsequent 30 years.

The MTA considers that it would be appropriate to index this threshold to 2016 prices, and thereafter have an annual threshold indexation applied. This provision should be included in the legislation.

It is crucial the consumer guarantee be extended to businesses who are consumers as well. One of the major concerns of MTA members was that retailers were liable for consumer guarantees where they were supplied that product from manufacturers where the fault occurred during manufacture. There should be greater protections for retailers and wholesalers from this type of claim; and manufacturers should be able to be made a party to a claim where appropriate.



## Proposed ACL Reforms

### Clarity and Definition of Terms

The language of ACL is complex and subjective, leading to unnecessary confusion and litigation.

The obligations and responsibilities and roles of various actors within ACL are not readily understood and in many cases there is insufficient definition of key terms and thresholds.

Specifically, the Act should:

- define a major fault;
- define a minor fault;
- define what constitutes reasonable time;
- include businesses that purchase goods and services in the course of trading, including where they are held liable for the fault of a product supplied by a manufacturer, in the definition of consumers;
- define the terms 'unconscionable conduct' and 'misleading' and 'deceptive' conduct, and 'reasonable person' better, without adding to the overall administrative burden. These are currently highly subjective terms that lack clarity in ACL. In particular, deceptive conduct can currently include omissions or silences that a reasonable person would find relevant. This is too subjective when dealing with products such as second hand vehicles where the faults may not even be evident to the sellers or the dealers if the vehicle is purchased through a trade in and the fault is not declared by the private seller;
- require plain English guidance for consumers, businesses, regulators and courts of arbitration that are a common point of reference for all parties.

### 'Lemon Laws'

The MTA strongly opposes further penalties and sanctions under ACL for motor vehicles experiencing repeated faults.

The evidence base demonstrating a need for 'lemon' laws is very weak. There is very little data that accurately quantifies the need for 'lemon' laws, partly because there is a lack of definition around what constitutes a 'lemon'.

The United States introduced 'lemon' laws in the 1960s at a time when few other consumer protections existed. It has one of the most mature legislative regimes globally and even there the definition of what constitutes a 'lemon' varies widely between States.

Does a vehicle that has multiple, separate faults constitute a lemon or does the vehicle that has the same fault fail repeatedly constitute a 'lemon'? It is be entirely unreasonable to legislate against the former, and there are already existing protections from Statutory Warranties that address the latter.

Additionally, the issue of whether a fault occurs because of product failure or because of poor use; unreasonable expectation; natural wear and tear or inappropriate vehicle selection for a given task is highly subjective and has a material impact on the performance of a vehicle and on the efficacy of any repairs.

The empirical evidence that does exist does not support the conclusion that there is a need for a 'lemon' laws. Evidence from Victoria, which already has state based 'lemon' laws, shows that the number of complaints, prior to the introduction of those laws, totalled less than two dozen annually.<sup>2</sup>

The Federal Chamber of Automotive Industries undertook a survey to determine the size and extent of vehicle complaints in Australia.

That survey found that 55% of cases are settled prior to determination by a tribunal, 40% are resolved in favour of a manufacturer and only 5% are resolved in favour of the complainant.<sup>3</sup> This suggests that vehicle dealers are acting responsibly and providing appropriate levels of consumer support for their products.

The risk of introducing broad, ill defined, 'lemon' laws is that they will actually increase litigation costs for both dealers and consumers, who receive minimal benefit given that 95% of complaints are either resolved amicably or against the consumer.

'Lemon' laws will create an unrealistic expectations of the types of claims that can be redressed and add to the level of grievance and agitation being experienced by those few consumers who are having difficulties.

ACL already provides sufficient remedy in these matters. An increase in the compliance burden will not improve the fault rate experienced by purchasers, as the more defined the legislation is the greater the exclusion of specific faults.

The modernisation of the vehicle fleet and the high level of technological integration have made diagnosis of vehicle faults increasingly complex.

Repair or replacement of a fault can be relatively straight forward once the component at issue is identified. However, it is diagnosis that poses the biggest obstacle to addressing faults. As an example, identifying where an electrical system is malfunctioning and diagnosing the specific component that has failed is multifaceted and often involves multiple components.

The success or otherwise of the attempted repair cannot always be immediately determined given the highly integrated nature of modern electrical components and software. This typical diagnostic process should not form the basis for 'lemon' laws in Australia.

The MTA considers a more effective mechanism to resolving these issues is the introduction of consumer redress programs by dealerships that emphasize complaint resolution and mediation as part of their aftersales service.

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<sup>2</sup> *Consumer Affairs Victoria, Inquiry into Lemon Laws, 2007.*

<sup>3</sup> *Federal Chamber of Automotive Industries, Response to 'Consumer Rights: Implied Conditions and Warranties', 2009*

The MTA also wishes to highlight two structural contradictions evident in the proposed move to 'lemon laws.'

First, ACL is described as a broad framework rather than a prescription solution to consumer protections. Even though it may be argued that 'lemon' laws could be more broadly applied, depending on the definition, there is no doubt that 'lemon' laws are intended to single out the retail vehicle sector as a bad actor in the economy, a claim which is just not true. This would undermine confidence in an industry that already has very robust consumer protections and very low levels of disputation.

It would be unconscionable that government would seek to place additional barriers in the way of growth of this already heavily regulated and highly competitive sector without conclusive proof that a need existed.

Second, government's decision to allow for the personal importation of motor vehicles thoroughly undermines the purpose of ACL. The basis of the personal imports decision towards consumer protection is 'buyer beware'. This is wholly inadequate to protect consumers and it is staggering that the ACCC supports such a laissez faire attitude to consumer protection.

Even with some level of theoretical legislated protection, in practice consumers will not be able to access ACL to pursue claims against overseas sellers, who are beyond the jurisdiction of ACL. This policy decision seems to be completely out of step with other competition and consumer protection settings initiated by government and supported by the ACCC.

Even under existing legislation, the ACCC and its state body, CBS, have significant difficulty in securing prosecutions and stemming the insidious spread of unlicensed and unaccredited backyard car dealers domestically – i.e. in places where they can actually access physically and have jurisdiction to prosecute. This is not a criticism of either of those agencies; it is an observation of the inherent difficulty of their task.

It is important for government and the regulators to understand that licensed and accredited businesses, which the MTA represents, are as frustrated by the backyard operators and unlicensed operators as consumers are.

This personal imports decision will now effectively open the door for an influx of overseas backyard sellers on a global scale and the ACCC and CBS will have no ability or jurisdiction to pursue these claims.

The burden of undertaking repairs to these vehicles will fall on domestic repairers and dealerships that, incorrectly, will be expected to be able to provide service, repairs, parts and advice on vehicles carrying manufacturers branding even though they do not provide aftersales support those models in Australia.

The likely consequence of this decision will be refusal to work on or provide advice on these personally imported vehicles to consumer for fear of ACL claims, or if cars do not pass inspection they will be left on the docks unclaimed.

Equally, Australia already has the most competitive retail vehicle markets in the world with over

64 brands available for 1.1 million sales each year, compared to the United States which has only 50 brands on sale for over 15.6 million purchases annually.<sup>4</sup> The ACCC's argument of a consumer detriment because of a lack of competition is not sustainable.

Personal imports will severely harm the viability of dealerships and increase the reliance upon foreign private sales to Australian consumers. This will create chaos for consumer protection and leave consumers with practically no recourse from unconscionable conduct and deception or even simply from faulty products. The MTA opposes personal import measures in the strongest terms.

## Product Safety Standards

MTA members have expressed concern about the nature of product safety standards in Australia.

Standards should not allow for the importation of products that are unsafe into the Australian market. Currently, safety standards are voluntary unless expressly made mandatory by Ministerial intervention. This is a cumbersome and slow process which is not working as effectively as it could.

The MTA is aware of several situations where current ACL protections are not adequate. Personal imports of vehicles, as stated above, pose a serious threat to consumer protection and these inconsistencies have not been reconciled by the flagged framework put forward by the government which the MTA considers to be naïve and inefficacious.

Further, various vehicle components available online are supplied absent essential features and require alteration or modification for fitment. This can be done through qualified businesses and tradespeople, but there are a great many that attempt to undertake these safety critical modifications at home or through backyard operators. This poses a serious safety risk and such products should not be available in Australia.

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<sup>4</sup> Joshua Dowling, *The Future of the Australian Car Industry*, Carsguide, <http://www.carsguide.com.au/car-news/the-future-of-the-australian-car-industry-once-the-factories-close-29726>, 2014.

Figure 1

*This figure shows rims that have not had the stud holes drilled to enable fitment to a vehicle. Currently, this work can be done by anybody and is unregulated, when in reality, this work should be undertaken in consultation with a qualified engineer or metallurgist to ensure there is rim is not weakened by the alteration through cracking, bending or distortion.*

Return to MARS Wheels list

**MARS**  
PERFORMANCE WHEELS

MP-LM



Hyper Silver with Dish    Hyper Silver with Dish    Hyper Silver with Dish

WHEEL SPECS

Rim Size	P.C.D.	Offset	Centerbore
18 x 8	5 x 100	30	
	5 x 110	30	72.5
	Custom drill (112-120)	Custom cut (30-40)	
19 x 8.5	5 x 112	35 / 45	66.6
	5 x 120	35	72.5
	Custom drill (100-120)	Custom cut (20-45)	72.5

nance.com.au/attachments/custom/MP-LM-028.jpg

Figure 2 & 3

*This figure shows stud holes that have been elongated to enable fitment to multiple stud patterns on a vehicle rather than being fit for purpose. This is evident through the partial eclipse like drill pattern on the rim. A vehicle travelling at speed would be at risk when moving over undulating surfaces, causing slippage, and would cause impact damage on the stud hole perimeter, and potentially, damage the studs themselves, making the vehicle unstable.*



These products figured above self-evidently pose safety risk for consumers. Rim and tyres not made to Australian Standards that are imported from overseas and deteriorate faster and at lower impact speeds while travelling than the certified Australian equivalent.

The justification for this from regulators is typically there is a cost difference between the items that places the consumer at some level of financial disadvantage.

Such cost saving are a pyrrhic victory for consumers. The initial cost differential in these circumstances is more than offset by the cost of replacement of affected parts, repair costs to damaged vehicles and the potential for physical harm in the event of product failure.

Additionally, the theoretical cost saving realised by the consumer during the initial purchase is brought about precisely because those products and practices which do not go through regulated and accredited imports channels are not subject to the same vigorous standards and are generally of poorer quality.

ACL should be amended to ensure Australian levels of quality and safety are reflected in international standards in line with our international trading partners and source markets.

## Balance in ACL Decisions

Virtually all respondents to the MTA's member survey highlighted the perceived bias towards consumers when it comes to resolving consumer complaints. The prevailing view is that ACL is interpreted to penalise businesses from the outset and that consumers are given the benefit of any doubt.

Even though ACL claims must be established on the balance of probability, the fact a product does not function as the consumer wishes is often considered *res ipsa loquitur* evidence that there is a fault with the product and the retailer or wholesalers bears a level of liability.

This is not so.

There are several reasons why a product does not meet consumer expectations, and these do not necessarily involve a failing by the retailer or wholesalers.

In many cases a product can be subject to ACL due to poor use, unreasonable expectation, natural wear and tear or inappropriate selection for a given task and buyer remorse. Additionally, the product may have been supplied to the retailer or wholesalers from the manufacturer in an unfit state that is unable to be detected in the normal course of trading until the product is used.

The MTA considers that an ACL claim needs to be interpreted to establish that there is in fact a fault that has occurred, as opposed to a misunderstanding or buyer's remorse, and that the retailer or wholesalers could have reasonably been aware of this at the time of purchase but did not disclose it.

ACL should also make provision for retailers and wholesalers to be able to more easily reclaim their costs from manufacturers where it is established that the product was supplied in an inadequate form or to make manufacturers party to an ACL claim if they feel it appropriate.

ACL should consider the provision of a manufacturer's warranty that protects third party installers from faulty or substandard supplied parts. Currently, these parts become the responsibility of the installer when a fault occurs for ACL purposes.

## **New Businesses Models and ACL**

The MTA is concerned that a spate of new business models pose serious consumer risk and threaten to create structural imbalances in certain markets that undermine fair trading and effective competition.

Firstly, government sponsored auction houses, particularly for motor vehicles; flood the market with particular models of vehicles at much cheaper prices than in the retail market. They are able to do this because the standard statutory warranties and aftersales support provided by licensed dealers are not offered.

On the other hand, these vehicles are of such concentration and the throughput of these vehicles so high, licensed dealers are competing against a price floor set on an uneven playing field by the auction houses.

ACL should require auction houses to provide the same warranties and guarantees and licensed vehicle dealers, with costs borne either by the auction house or recovered from the sellers as part of the auction houses commission fees.

Secondly, the increasing use of online sales, marketing and consumer interaction pose new risks for businesses, particular in the social media space.

The UK's Competition and Markets Authority has identified that up to £23 billion of spending is influenced by online reviews each year.<sup>5</sup>

Australian research has identified a similar consumer reliance on online reviews when making purchasing decisions and passing judgements on the quality of businesses they are considering transacting with. Nielsen surveyed over 5000 people and found that 71% of people read, discussed or commented on brands in the previous 12 months.<sup>6</sup>

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<sup>5</sup> Oli Gross, *Protection needed against 'malicious' online reviews*, The Publican's Morning Advertiser, June 2015, [http://www.morningadvertiser.co.uk/Running-your-pub/Marketing/Protection-needed-against-malicious-online-reviews?utm\\_source=copyright&utm\\_medium=OnSite&utm\\_campaign=copyright](http://www.morningadvertiser.co.uk/Running-your-pub/Marketing/Protection-needed-against-malicious-online-reviews?utm_source=copyright&utm_medium=OnSite&utm_campaign=copyright)

<sup>6</sup> The Nielsen Company, *New Online activities, services and devices bringing Australians more choices and new ways of doing old things*, March 2012, [https://www.iabaustralia.com.au/uploads/uploads/2013-10/1382457600\\_c1cbecde1fbbced6e44563f0dca379e9.pdf](https://www.iabaustralia.com.au/uploads/uploads/2013-10/1382457600_c1cbecde1fbbced6e44563f0dca379e9.pdf)



Similarly, a Sensis social media survey found around 67% of respondents reported reading online reviews or blogs before making a purchase decision, those aged 30 to 39 were most likely to do so and on average, and people expected to read 3 reviews before making a decision.<sup>7</sup>

Evidence from the United Kingdom shows that malicious online reviews cost 20% of businesses of up to A\$60,000 annually.<sup>8</sup>

Slater and Gordon<sup>9</sup> make the point those businesses with less than 10 employees (half than the Federal Government's definition of a small business) may be entitled to pursue defamation action against certain online reviews.

To be successful, such a business would need to prove that the online review was not the honestly held opinion of the reviewer or the review was malicious, ie damaging to the reputation of the business.

Conversely, a business may be subject to ACL action if a business *"encourages family and friends to write reviews about your business without disclosing their personal connection with your business in that review, write reviews when you have not experienced the good or service reviewed or which do not reflect a genuinely held opinion, solicit others to write reviews about your business or a competitor's business if they have not experienced the good or service. Businesses and review platforms that selectively remove or edit reviews, particularly negative reviews, for commercial or promotional reasons may be misleading consumers. If the total body of reviews doesn't reflect the opinions of consumers who have submitted the reviews consumers may be misled."*<sup>10</sup>

The issue here is that once again there is an underlying assumption that a business will seek to do harm by the consumer and therefore must be afforded a greater level of protection than a businesses or business owner who can be subject to commentary that affects their livelihood because of a disgruntled customer who may or may not have a legitimate complaint.

The consumer making the complaint can negatively review the product, and simply because it is their genuine opinion, be free to damage the reputation and sales of a business, regardless of whether the customer fully understands the capability of the product, the businesses obligations under ACL, if they are using it correctly or simply suffering buyer's remorse.

Even if a business felt strongly enough about particular commentary, engaging in online discussions, even if done privately, often perpetuate the dispute and private communications are often published as some kind of proof of the intransigence of the business in accepting the

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<sup>7</sup> Sensis, *Yellow Social Media Report: What Australian People and Businesses are doing with social media*, May 2014, <https://www.sensis.com.au/content/dam/sas/PDFdirectory/Yellow-Social-Media-Report-2014.pdf>

<sup>8</sup> Rebecca Burn-Callander, *Bad reviews and online 'trolls' cost UK businesses up to £30,000 a year*, The Telegraph, May 2015, <http://www.telegraph.co.uk/finance/businessclub/11635195/Bad-reviews-and-online-trolls-cost-UK-businesses-up-to-30000-a-year.html>

<sup>9</sup> Jeremy Zimet, *Do Defamation laws apply to online reviews?* Slater and Gordon, March 2015, <https://www.slatergordon.com.au/blog/do-defamation-laws-apply-online-reviews>

<sup>10</sup> Australian Competition and Consumer Commission, *Managing Online Reviews*, May 2016, <https://www.accc.gov.au/business/advertising-promoting-your-business/managing-online-reviews>



consumer's opinion. This leads many businesses to simply forgo rectifying misleading statements made by consumers.

ACL should be amended to include the same protections for businesses from misleading conduct by consumers, as consumers are parties to transactions covered by ACL and therefore should have similar obligations to act with integrity and with due regard to the impact of their conduct on fair trading and effective competition.

Additionally, online review platforms can boost the placement of products and the influence the reputation of the brand. Unlike conventional advertising or even online advertising, these platforms purport to be independent assessors of products and companies acting in the consumer's best interest.

It is usually undisclosed that many of the rated businesses have commercial relationships with the review platforms and are either afforded a screening process prior to reviews being published, or act effectively as brand boosters to their commercial partners, or only include those with commercial relationships in their review spectrum.

This creates obvious distortions in the consumer's preference for goods and is clearly misleading.

Such relationships and methodologies should be disclosed prominently so consumers understand how ratings are awarded for brand and businesses. Equally, star rating systems should also identify how many reviews have been submitted that contribute to the determination of the star rating.

## Access to Purchasing and Consumption Data

The proposal to increase access to a consumers purchasing and consumption data should be considered extremely carefully. Academically, a more informed consumer may make better choices but equally, exposing intellectual property rights to competitors' jeopardises legitimate property rights under common law and risks damaging effective competition and fair trading under ACL.

The Federal Government announced a dedicated cyber security strategy aimed at data protection for individuals and businesses in April this year.

In making this announcement, the Prime Minister made clear this strategy would provide a *"...roadmap as to how we will keep Australia safe and competitive in an increasingly digital world."*<sup>11</sup>

The MTA considers that enabling consumer to access their own input information may be a worthy action, but the aggregated conclusions and data of that input should remain the intellectual property of the business.

Businesses make significant investment to customise their customer management systems to provide higher levels of service to consumer. Making this intellectual property available widely may lead to a lower level of investment in this type of customisation and potentially make this information accessible to overseas competitors to Australian businesses, either through commercial transactions occurring between individuals and overseas competitors or insecure, privately held data that is subject to data breaches.

There is also a significant transaction cost to businesses that may have to provide for access to this data. Consider the budget allocation for the Commonwealth Freedom of Information (FoI) Commissioner is approximately \$1.7 million per year. The Victorian Commissioner is budgeted at \$2.7 million annually.

These numbers do not account for the FoI staff located within each department of the Federal Government nor the man/hours consumed with locating, preparing, compiling and providing this information.

To provide such a service is a significant cost to government. With government held data, there is a case to be made for the public accessing its own personal data and the on the deliberations of government in an open democracy in the public interest.

However, providing a commensurate level of data from a small or medium sized business would be a crushing administrative cost for little consumer benefit and potentially damaging to the economic interests of Australia should that intellectual property be provided to competitors or devalue the investment made in acquiring they aggregated data for the development of better business practices or products.

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<sup>11</sup> Rohan Pearce, *Turnbull launches government's cyber security strategy*, Computerworld, April 2016, <http://www.computerworld.com.au/article/598438/turnbull-launches-government-cyber-security-strategy/>

It is also interesting to note that Australia's political parties have an exemption for their client knowledge databases from Freedom of Information laws and the *Privacy Act 1988*. Presumably if businesses were subject to increased data disclosure requirements then so to would Australian political parties.<sup>12</sup>

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<sup>12</sup> Australian Law Reform Commission, *Australian Privacy Law and Practice: Political Exemption*, Australian Government, May 2016  
<http://www.alrc.gov.au/publications/41.%20Political%20Exemption/introduction>